IN THE

Supreme Court of the United States

October Term, 1962

No. 780

STANDARD COIL PRODUCTS CO., INC.,
Petitioner,

—against—

UNITED STATES OF AMERICA,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

REPLY BRIEF OF PETITIONER

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IN THE

Supreme Court of the United States

October Term, 1960

No. 789

STANDARD COIL PRODUCTS CO., INC.,

Petitioner,

—against—

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

REPLY BRIEF OF PETITIONER

I

It is difficult to understand the government's position that a review by this Court is not warranted when the government itself asserts (a) that the issues in this case are closely related to the question before this Court in *Gori* v. *United States*, No. 486, this Term (Br. in Opposition, pp. 15-16), (b) the issues in this case are novel and not without difficulty (Br. in Opposition, p. 16), and (c) that the decision of this Court in *United States* v. *Weisman*, 266 U. S. 377 (1924), has been in effect overruled by Rule 29(a) of the Federal Rules of Criminal Procedure with respect to the

power of a federal trial judge to direct a verdict of acquittal at any stage of the proceeding if he deems the evidence insufficient (Br. in Opposition, pp. 9-10).

We respectfully submit that these contentions of the government demonstrate the serious and important issues in this case which should be decided by this Court.

II

The government's own arguments in support of its position that the trial court did not have the "power" to direct a verdict of acquittal after eight days of trial, show the general importance of this case and its far-reaching implications in the administration of criminal justice.

The government argues that it has a constitutional right to a trial by a jury in a criminal action and that without presentation "of the whole of the government's evidence an acquittal on the evidence is a usurpation of power" (Br. in Opposition, p. 12), and that "even after the government has had an opportunity to present all its evidence, the judge is under a duty to resolve questions of credibility and draw the inferences favorable to the government" (Br. in Opposition, p. 11).

Apparently the government is here asserting for itself the right in a criminal case to seek review and reversal by collateral attack of any action by a trial judge which erroneously precludes the government from presenting its evidence and perhaps even the erroneous ruling of a federal trial court in directing a verdict of acquittal after the government rests.

III

The government appears to be arguing that an erroneous ruling is beyond the power of a trial judge in a criminal proceeding and that such an erroneous ruling retroactively nullifies the jurisdiction of the court, thereby making the entire proceeding void.

The government significantly makes no mention in its brief that the trial judge did have jurisdiction of the case. Moreover, the government's brief acknowledges that there is "power" in a trial judge to direct a verdict of acquittal before the close of the government's case if the trial judge deems the evidence insufficient. The government concedes that under certain circumstances, such as "where the government's opening statement shows that the evidence it proposes to introduce cannot support a conviction" (Br. in Opposition, p. 10), a trial judge has the power to direct a verdict of acquittal. If the trial judge is in error in finding the government's opening statement insufficient, does this "error" cause the trial judge to lose the "power" to make such assessment of the government's opening statement so that his decision can be reviewed and reversed by collateral attack? If, as the government apparently concedes, a trial judge has the "power" to assess the government's opening statement and direct a verdict of acquittal if he believes it insufficient, then the trial judge below must have the "power" to direct a verdict of acquittal after listening to the government present its case for eight days.

IV

The government in discussing the basic constitutional issue of double jeopardy here presented, requests that the

Supreme Court "hold this petition" (Br. in Opposition, p. 16) pending the outcome of *Gori* v. *United States*, No. 486, this Term, because the instant case is "closely related" (Br. in Opposition, p. 16) to the *Gori* case.

The government, in the *Gori* case, in opposition to the petition for certiorari, urged that the trial judge must have "broad discretion" and that the "trial judge must be the ultimate arbiter" even though he acts with "questionable judgment" in terminating the trial. *Gori* v. *United States*, No. 486, this Term, Br. in Opposition, pp. 4, 7. In the present case the government argues that the trial judge should not be the final arbiter in determining how and when to terminate a criminal case.

V

The government argues against granting certiorari at this time, on the one hand, by suggesting that the Supreme Court might wish to hold this petition pending the outcome of *Gori* v. *United States*, because the two cases are closely related (Br. in Opposition, p. 16). On the other hand the government, at page 17 of its brief in opposition, argues that certiorari should not be granted because the issues presented by the petitioner "involve a unique situation in Anglo-American jurisprudence which lacks the general importance that would call for further review," and that "there is not the slightest reason to suppose that the case will ever be repeated."

It is respectfully submitted that the very relationship to the *Gori* case, acknowledged by the government, and the apparently inconsistent arguments used by the government in opposing certiorari in the *Gori* case and in the instant

case, add strong reasons for granting certiorari herein and for hearing argument in both cases at the same time.

The "unique" element in this case is the successful invocation by the government in a criminal case of the jurisdiction of the Court of Appeals in a mandamus proceeding, where no appeal lies, and the reversal of a judgment of acquittal.

It is respectfully suggested that the government's contention that there is not the slightest reason to suppose that this case will ever be repeated, is the opposite of what may be anticipated. If the decision below is allowed to stand, it will open a Pandora's box of mandamus proceedings. Every time a trial judge precludes any of the prosecution's evidence, every time he limits or criticizes an over-zealous government attorney, every time he sets aside a jury verdict of guilty and directs judgment of acquittal, his action will be subject to review and reversal.

VI

The government, at page 17 of its brief, argues that the petition should not be granted at this time even if double jeopardy does exist since "at this stage petitioners are faced with nothing more serious than the inconvenience of a new trial." Nothing more serious indeed! In the words of Justice Gray, in *United States* v. *Ball*, 163 U. S. 662 (1896), at page 169:

> "The Constitution of the United States, in the 5th Amendment, declares: 'Nor shall any person be subject to be twice put in jeopardy of life or limb.' *The prohibition is not against being twice punished, but against being twice put in jeopardy;* and the ac-

cused, whether convicted or acquitted, is equally put in jeopardy at the first trial." (Emphasis added.)

Thus, whereas the government cavalierly dismisses as a mere "inconvenience" the injustice of subjecting the defendants to the fear, harassment and expense of a second criminal trial, the Founding Fathers deemed it important enough to provide against being put through such a trial for the second time to include it in the Fifth Amendment to the Constitution.

CONCLUSION

It is respectfully submitted that the petition for writ of certiorari should be granted, that the argument in No. 486 should be postponed, and that Nos. 788 and 789 should be set for argument immediately following No. 486.

Respectfully submitted,

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